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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/693,371

10/24/2003

Kenneth S. Zukor

FL/140

2596

28596 7590 05/21/2010  
GORE ENTERPRISE HOLDINGS, INC.  
551 PAPER MILL ROAD  
P. O. BOX 9206  
NEWARK, DE 19714-9206

EXAMINER

LU, JIPING

ART UNIT

PAPER NUMBER

3743

MAIL DATE

DELIVERY MODE

05/21/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/693,371	<b>Applicant(s)</b> ZUKOR ET AL.	
	<b>Examiner</b> Jiping Lu	<b>Art Unit</b> 3743	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 01 April 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-5, 8-14, 27-30, 32 and 37-42 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5, 8-14, 27-30, 32 and 37-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Claims Status***

1. Claims 1-5, 8-14, 27-30, 32 and 37-42 are now in the case and remain rejected as last Office action.

### ***Claim Rejections - 35 USC § 103***

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 1-5, 8-14, 27-30, 32, 38, 40-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (U. S. Pat. 6,619,499) in view of Jones (U. S. Pat. 5,732,837).

Lin shows a removable processing cap assembly 24 comprising a cap 31 comprising a cap 22 having a top 26 and a bottom (at 30), said cap 22 comprising a housing 28 with a sealing perimeter (at 38) at the top of the cap adjoined to a conformable section 30, said conformable section having an internal recess 28 for engaging with a stopper and for sealing around a container opening 34, wherein said cap 22 allows vapor passage between the container and an external atmosphere, a venting media 40 oriented at the top of the cap 22 and external to said container opening 34 forming a barrier isolating the container from the external atmosphere. The cap 22 and the venting media 40 are removable from the closed container. The cap is hermetically sealed to the container. The cap assembly further comprises a top covering 46. The cap comprises at least two components 26, 40. The cap assembly comprises a rigid section 26 and a conformable section 30. However, Lin does not show that the venting media formed of a

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polymer film or an expanded polytetraflouroethylene. Jones teaches a concept of using polymer film or an expanded polytetraflouroethylene as venting media same as claimed (col. 3, line 64 to col. 4, line 20) for providing effective resistance to bacteria penetration (col. 3, lines 66-67).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the removable processing cap assembly of Lin to substitute the venting media 30 formed of a polymer film or an expanded polytetraflouroethylene of Jones for the venting media 40 of Lin in order to provide effective resistance to bacteria penetration. As for the limitations, “for isolation of contents in a stoppered container” in lines 1-2 of claims 1, 8, 27, 40, 42, “for engaging with a stopper and for sealing around a container opening, wherein said cap allows vapor passage between the container and an external atmosphere” in lines 5-8 of claims 1, 40, “..adapted for sealing ...allows...external atmosphere” in lines 5-7 of claim 8, “compatible with stopper and vial assemblies” in line 2 of claims 32, 41, “... is adapted for maintaining... passage of vapor” in claim 38, “is sealed to the venting media” in claim 29, they are viewed as functional or intended use limitations. As MPEP 2114 states, “[a] claim containing a “recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus” if the prior art apparatus teaches all the structural limitations of the claim”. In this case, the limitations above do not add any structural limitations to the claims and apparatus of Lin as modified by Jones discloses all the structural limitations. With regard to the claimed single material, it would have been obvious to one having ordinary skill in the art at the time the invention was made to choose any kind of desired material for cap in order to pursue an intended use, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the

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intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416. With regard to the claimed gasket between the top covering and the venting media, examiner takes official notice that it is well known in the sealing art to use gasket for sealing purpose.

4. Claims 37 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (U. S. Pat. 6,619,499) in view of Jones (U. S. Pat. 5,732,837) as applied to claims 1, 32 as above, and further in view of Grimard (U. S. Pat. 5,803,284).

The cap assembly of Lin as modified by Jones as above includes all that is recited in claims 37, 39 except for a stopper within the processing cap. Grimard teaches a cap assembly comprising a stopper 424 seated in a first position within the processing cap 400 adjacent the recess, said first position allowing passage of vapor between the container 18 and the external atmosphere (see fig. 8); said stopper being movable to a second position in the container to close the container opening and prevent the passage of vapor (see Fig. 10). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to further modify the cap assembly of Lin to include a stopper as taught by Grimard in order to assure a complete seal to the container.

### ***Response to Arguments***

5. Applicant's arguments filed 4/1/2010 have been fully considered but they are not persuasive to overcome the rejections. First, claims presented fail to structurally define over the prior art references. The applicant is requested to point out from the claims presented exactly which limitation(s) that the prior art references fail to teach or show. For example, claim 1 merely calls for a conventional bottle or container cap with a polymer film or expanded

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polytetraflouroethylene venting media at the top of the cap to form a barrier to allow vapor passage from the container. Lin shows a removable processing cap assembly 24 with a venting media 40 oriented at the top of the cap 22. Jones discloses a cap assembly with a venting media formed of a polymer film or an expanded polytetraflouroethylene. Therefore, it would have been obvious to one of ordinary skill in the art to have a venting media formed of a polymer film or an expanded polytetraflouroethylene in view of the known, suitable alternatives in the prior art as evidenced by Jones. "When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person ordinary skill can implement a predictable variation, 35 USC 103 likely bars its patentability." (*KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 401, 127 S. Ct. 1727, 1731 (2007)). . 82 USPQ 2d 1385 (2007). For the same reason, "if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that is would improve similar device in the same way, using the technique is obvious unless its actual application is beyond his or her skill. ....[A] court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions." Second, on page 3 of the Remarks, the applicant argues the combination of the prior art references would render the prior art unsatisfactory for its intended purposes. The examiner does not agree. It is noted that "[a]lthough a reference that teaches away is a significant factor to be considered in determining unobviousness, the nature of the teaching is highly relevant, and must be weighed in substance. A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product or the same use." *In re Gurley*, 27 F.3d 551,553 (Fed. Cir. 1994). In the present case, Jones teaches it is know to choose polymer film

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or an expanded polytetrafluoroethylene as venting media, which may be inferior to Lin, itbut is still known and functional alternative. Finally, with regard to claims 37 and 39, on pages 3-4 of the Remarks, the applicant argues that Lin patent cannot be modified by Jones patent because the teachings of Grimard fails to teach the cap assembly o. The examiner disagrees for the reasons as set forth in the rejection above.

### ***Conclusion***

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jiping Lu whose telephone number is 571 272 4878. The examiner can normally be reached on Monday-Friday, 9:00 AM - 5:30 PM.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, KENNETH RINEHART can be reached on 571-272-4881. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jiping Lu/  
Primary Examiner  
Art Unit 3743

J. L.